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JOHN T. FEY, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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## No. 887

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OLAF PEDERSEN'S REDERI A/S, as claimant of the M/V SUNNY PRINCE,

Petitioner,

against

MOTOR DISTRIBUTORS, LTD., et al.,

Libelants-Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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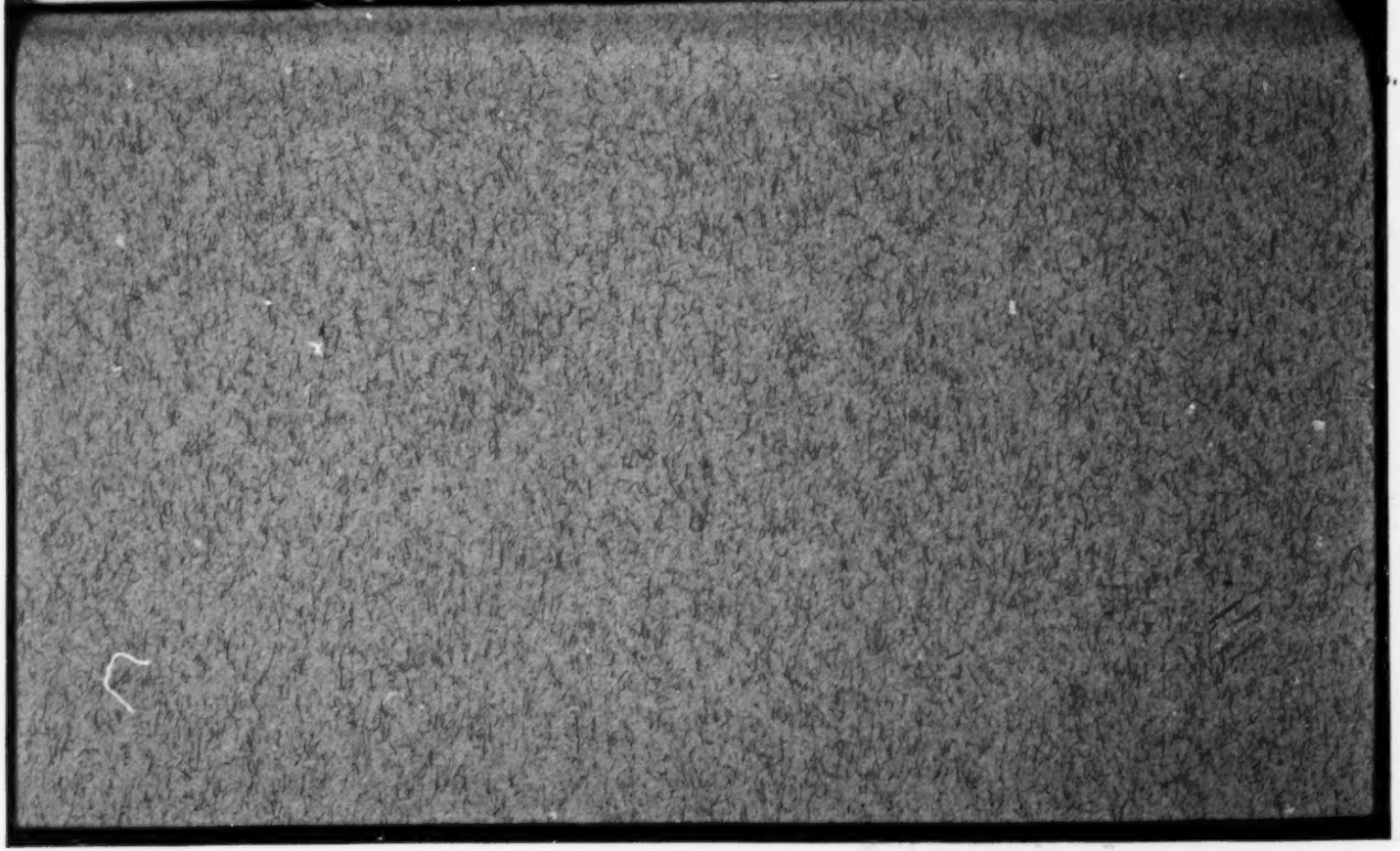

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IN THE

# Supreme Court of the United States

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OLAF PEDERSEN'S REDERI A/S, as claimant of the M/V SUNNY PRINCE,

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against

MOTOR DISTRIBUTORS, LTD., et al.,

Libelants-Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Olaf Pedersen's Rederi A/S prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on November 27, 1956 (and adhered to by order entered January 8, 1957, denying timely petition for rehearing), reversing the decree of the United States District Court for the Southern District of Florida, which dismissed the libel filed by Motor Distributors, Ltd., et al, against the M/V "SUNNY PRINCE".

## CITATIONS TO OPINIONS BELOW

The unreported Opinion and Order of the United States District Court for the Southern District of Florida dismissing the libel is printed in Appendix A hereto, p. 1. The unreported Order of the District Court denying Petition for Rehearing and amending the Order granting the motion to dismiss the libel with regard to costs is printed in Appendix B hereto, p. 4. The Opinion of the Court of Appeals for the Fifth Circuit, reversing the decree of the District Court, is printed in Appendix C hereto, p. 6, and is reported in 239 F. (2d) 463. The unreported Judgment of the Court of Appeals is printed in Appendix D hereto, p. 16. The unreported Order of the Court of Appeals denying the petition for rehearing is printed in Appendix E hereto, pp. 17.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was handed down November 27, 1956 and Judgment was entered (Appendix D hereto, pp. 16). Timely petition to the Court of Appeals for rehearing, filed on December 18, 1956, was denied by an order filed January 8, 1957 (Appendix E hereto, p. 17).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

(a) Do non-resident aliens have an absolute right to maintain an action **in rem** against a foreign flag vessel

owned by other non-resident aliens in the Courts of the United States to enforce a maritime lien based upon an admiralty cause of action arising outside the territory of the United States?

(b) If the answer to (a) is in the negative, what are the proper criteria to be applied in determining whether jurisdiction should be declined or retained?

(c) If the answer to (a) is in the negative and if the decision to retain or decline jurisdiction is within the discretionary power of the District Court, does the Court of Appeals have the power to substitute its discretion for that of the District Court?

## STATEMENT OF THE CASE

The libel **in rem** herein, filed on October 21, 1955, by six libelants all of which are non-resident aliens (four Irish, one British and one German), claims $170,000 damages to cargo allegedly owned by them and lost when the German steamship "Hoheweg", bound from Hamburg, Germany, to Dublin and Cork, came into collision with the Norwegian M/V "SUNNY PRINCE", owned by petitioner (claimant below, a citizen of Norway and thus also a non-resident alien), off the Southern English coast in the English Channel between Hastings and Dungness, on February 14, 1955. On February 15, 1957, the District Court permitted the amendment of the libel herein by the inclusion of 15 additional non-resident alien libelants, 11 of which are Irish and four British. Many other claimants are pursuing their remedies abroad.

The "Hoheweg" sank as a result of the collision. All

hands were saved by the officers and crew of the M/V "SUNNY PRINCE", but the cargo, including that allegedly owned by libelants, was lost.

In the eight months interval between the date of the collision and the date upon which this suit was commenced, the "SUNNY PRINCE" called at British and German as well as Dutch ports. As stated by Judge Choate in his opinion in the District Court (Appendix A hereto, p. 1):

> "From the uncontroverted facts set forth in Claimant Respondent's Motion to Dismiss filed on November 21, 1955, it appears that 'the "SUNNY PRINCE" called at Dover, England, immediately after the collision and was surveyed, at which survey the "Hoheweg" interests were represented.' The ship then 'proceeded to Rotterdam for discharging and repairs, and following repairs went to Hamburg, Germany.' No attempt to arrest the M/V "SUNNY PRINCE" was made at any of these ports, and although there was extensive correspondence and meetings nothing was done until the vessel was arrested at Port Everglades, Florida."

The District Court further stated that "there does not appear to be any reason why a suit should not have been brought, or arrest should not have been made, at a place where one or more of the parties in interest and the witnesses reside." (App. A p. 2).

In exercising his discretion in declining jurisdiction of this suit, Judge Choate held (Appendix A hereto, p. 2):

"This Court could exercise jurisdiction, but will entertain jurisdiction in causes between foreign parties arising from losses occasioned by the collision of two foreign vessels on the high seas only in those cases in which an injustice would be visited on either of the parties if the Court declined jurisdiction. No such showing has been made in this case. Rather, more cogent reasons exist that the suit should be maintained in either England, Norway, or Germany. All of the parties are citizens of either England, Norway, Germany, or the Irish Free State. The M/V "Sunny Prince" and the M/V "Hoheweg" were registered under the laws of Norway and Germany respectively. The officers and the crew of each vessel—the material witnesses—would not be available for compulsory attendance in this Court. For these reasons this Court declines jurisdiction in this case. See Canada Malting Co., Ltd. v. Paterson Steamships, Ltd., 285 U.S. 413, 423, 424 (1932)."

Libelants then petitioned for rehearing, which on February 7, 1956, was denied, except as to the fixing of costs.

Subsequent to the decisions of the District Court below the German owners of the "Hoheweg" on June 19, 1956, brought suit for damages arising out of the collision in the British Admiralty Court against the owners of the "SUNNY PRINCE". The owners of the "SUNNY PRINCE", petitioners herein, have entered their appearance and the litigation is proceeding in that Court.

Also, on Friday, August 31, 1956, while the "SUNNY PRINCE" was at the port of Hamburg, she was arrested in a suit brought on behalf of certain of the cargo laden aboard the 'Hoheweg". Arrangements have now been made pursuant to which these claimants will proceed in the London litigation.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

**1. The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the ruling of this Court and other Courts of Appeals in similar matters.**

The opinion of the Court below denies to the District Courts discretion to decline jurisdiction of admiralty collision suits in rem. This is in conflict with this Court's enunciation of the doctrine of discretionary exercise of jurisdiction as set forth in **The Maggie Hammond**, 76 U.S. 435 and **The Belgenland**, 114 U.S. 355, both of which were in rem suits. TheCourt of Appeals for the Fifth Circuit apparently did not recognize that discretion to retain jurisdiction of an in rem suit, obviously includes discretion to decline jurisdiction, and its decision in this case is contrary not only to the rulings of this Court, but also to those of the Second and Ninth Circuits, where such discretionary power has been expressly recognized in in rem suits involving non-resident aliens.

In **The Falco**, 20 F.2d 362 (1927), the United States

Court of Appeals for the Second Circuit affirmed the discretionary action of the District Court in declining jurisdiction of an **in rem** suit for personal injuries by a Brazilian seaman against a Swedish ship.

In **The Kanto Maru**, 112 F.2d 564 (1940) an **in rem**, (as well as **in personam**) libel by a Norwegian Shipowner against a Japanese shipowner for damage resulting from collision in Japanese waters was dismissed by the District Court for the Southern District of California, where the vessel had been arrested. The Court of Appeals for the Ninth Circuit affirmed on the authority of **The Belgenland**, supra; **The Maggie Hammond**, supra; and **Charter Shipping Co., Ltd. v. Bowring**, 281 U. S. 515, stating:

> "While it is true that there are some reasons advanced by the libelant which would point to the desirability of retaining jurisdiction there are many facts stated by the trial court in the findings upon which it based its decision which tend to fully justify that decision, but it is not for this court to weigh these conflicting considerations. So far as this appeal is concerned, it is enough to say that the court below, in its refusal to exercise jurisdiction did not abuse its discretion." (p. 566)

Although the majority of cases in which discretion in declining jurisdiction has been affirmed are **in personam**, suits most of them make no distinction between **in personam** and **in rem** suits and cite as authority this court's decisions in **The Belgenland**, supra, or **The Maggie Hammond**, supra, both **in rem** suits. See for example,

**Canada Malting Co. v. Paterson Co.**, supra, **Charter Shipping Co. v. Bowring, Jones & Tidy**, 281 U.S. 515; **Langnes v. Green**, 282 U.S. 531 (1931); **United States Merchant's & Shipper's Ins. Co. v. A/S Den Norske Afrika og Australie Line** 65 F.2d 392 (2d Cir., 1933). In **The Maggie Hammond**, this Court stated:

> "* * * it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum." (76 U.S. at p. 457).

It is submitted that a non-resident alien libelant does **not** have an absolute right to have his case tried by a United States Court simply because he was successful in arresting respondent's vessel in the United States waters and the District Court has the same discretion in **in rem** suits as it does in **in personam** suits. The Court of Appeals for the Fifth Circuit acted contrary to the holdings of this Court and of other Circuits in interpreting the rule otherwise.

**2. The issuance of a writ of certiorari in this instance is necessary to prevent extraordinary prejudice, inconvenience and embarrassment to petitioner.**

These European libellants have elected not to litigate their claims in Europe but to proceed in Florida, admittedly because of this dissatisfaction with certain as-

pects of their own law. The libelants certainly should not be encouraged in their forum shopping efforts. Their bringing suit here rather than in their own courts causes petitioner great prejudice and inconvenience in defending suit here as well as in other jurisdictions, including that of many of these libelants. It is for these reasons that the District Court in the sound exercise of its judicial discretion declined jurisdiction stating that "more cogent reasons exist that the suit should be maintained in either England, Norway or Germany." On appeal, the Court of Appeals reversed the District Court and accepted jurisdiction **without considering** whether "special circumstances exist to show that justice would be better subserved by declining it." **The Belgenland**, 114 U.S. 355, 367, or whether taking jurisdiction of this case "would work an injustice" (Appendix C hereto, p. 6).

We respectfully submit that retaining jurisdiction of this case does cause injustice to respondent, and that the only benefit which these libelants can claim from suit here is the avoidance of the consequences of their own law. Under these circumstances the District Court was right in declining jurisdiction of this cause. There was no abuse of discretion and its discretion should not have been disturbed.

**3. If the District Court has discretion to decline jurisdiction of this cause, the Court of Appeals should not have remanded the cause for trial.**

The United States Court of Appeals for the Fifth Circuit remanded this cause for trial without considering or determining whether the taking of jurisdiction "would work an injustice." The Court of Appeals, as discussed

above, by so doing denied that discretion exists to decline jurisdiction of **in rem** suits. But if, as we contend, discretion does exist such discretion rests in the District Court and should not be reversed except for abuse of discretion, "the exercise of such discretion being final except in case of abuse".**The Mandu,** 102 F.2d 459, 462. (2d Cir., 1939).

The Court of Appeals for the Fifth Circuit in this **in rem** suit fell into the same error as that committed by the Court of Appeals for the Second Circuit in **The Western Farmer,** 210 F.2d 754 (2d) ir., 1954) an **in personam** suit. Both of these decisions are inconsistent with the ruling of this Court in **The Belgenland, supra,** to the effect that:

> "As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action" (368).

This Court then quoted with approval from an English case[1] which said:

> "'* * * The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeals holds, that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his

[1]The Leon XIII, 8 Prob. Div. 121.

discretion so unjust or unfair as to entitle us to overrule his discretion'" (p. 368)

The Court then said as to the foregoing:

"This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case which calls for animadversion" (p. 368).

See also **Delno v. Market St. Ry. Co. et al.**, 124 F.2d 965, 967 (9th Cir. 1942). In that case the Court gave a definition of abuse of discretion, stating that:

"Discretion, in this sense, is abused when the judicial action is **arbitrary, fanciful** or **unreasonable,** which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion" (p. 967). (emphasis added)

Even if the Court of Appeals disagrees with a discretionary ruling of the District Court and finds that there has been abuse of discretion, the Court of Appeal should not arrogate to itself the discretion given to **nisi prius** courts. In such instances, the proper procedure is to remand the case to the District Court for decision not inconsistent with the holding of the Court of Appeals. See for example: **O. & Y. Nuri v. The Johanna et al.** 210 F. 2d. 261 (4th Cir. 1954).

**4. Important jurisdictional questions are raised by the decision herein of the United States Court of Appeals for the Fifth Circuit.**

The United States Court of Appeals for the Fifth Circuit, although rendering lip service to the decision of this court in The Belgenland, has refused to recognize that the decision of the District Court declining to retain jurisdiction of this case was within the discretion of that Court. **The Belgenland,** 114 U.S. 355. The Court of Appeals interpreted the opinion of this Honorable Court in The Belgenland in such a way as to deprive the District Court of the very discretion which that case so carefully protects. Such diminution of the discretionary power of the court of first instance raises important jurisdictional questions which should be considered by this Court. But where such discretion exists criteria must also be enunciated in order to guide lower courts between the Scylla of no discretion and the Charybdis of too wide latitude.

The need for guidance in this field is pointed out in the article "The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty—An Object Lesson in Uncontrolled Discretion" by Bickel, 35 Cornell Law Quarterly 12, pp. 19-41 (1949), cited by this Court in **Swift & Company Packers et al. v. Compania Colombiana Del Caribe, S.A.,** 339 U.S. 684 (1950). In that article comparison is made between actions by seamen for wages, actions by seamen for injuries sustained in the course of employment, and actions involving collision, salvage, bottomry, charter-party and the like. It points out that:

> "It is not entirely clear why the Federal courts should ever have assumed jurisdiction over suits between one foreign ship-owner and another, or between foreign ship-owners and their creditors, charterers or salvors." (p. 31);

and that:

> "It may be argued with some force that jurisdiction over this class of cases should be entirely abandoned. There is no valid reason for retaining it, such as the desire to protect seamen." (p. 39).

Nevertheless, Courts have been reluctant to decline jurisdiction, and need for guidance in the field is imperative. The text writer suggests:

(1) That if no affirmative reason appears for retaining a case it must be dismissed—the burden of proof should be on the libelant;

(2) That no case will be retained simply because plaintiff's security is in the Court's power, nor should absence of a common forum be sufficient ground for retention; and

(3) That the Supreme Court should enumerate the factors to be considered in determining whether or not to decline jurisdiction.

We respectfully submit that this case gives to this Court an opportunity to eliminate conflict among the circuits and to give guidance to courts of first instance in their exercise of discretion to decline or retain jurisdic-

tion of suits such as this. As stated by the Cornell Law Quarterly article:

> "The field of admiralty's jurisdiction over foreigners * * * is one in which a particularly acute forum non conveniens problem exists, to the solution of which the technique of discretionary dismissal is alone suited. But experience here demonstrates that without help in the form of policy pronouncements from appellate courts to give direction to the exercise of discretion, the result is a small percentage of dismissals and a large percentage of confusion." (p. 47)

## CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE FOREGOING CONSIDERATIONS WARRANT ALLOWANCE OF THE WRIT SOUGHT BY PETITIONER.

Respectfully submitted,

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## APPENDIX A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA. MIAMI DIVISION

MOTOR DISTRIBUTORS, LTD., et al.,
Libelants

vs.

M/V "SUNNY PRINCE", her engines, boilers, tackle, etc.,
Respondent

### ORDER GRANTING MOTION TO DISMISS

This cause coming on to be heard upon the Claimant-Respondent's Motion to Dismiss filed in this cause on the 21st of November, 1955, and the Court having heard argument of counsel on the 13th of January, 1956, and having examined the briefs submitted, is of the opinion that this Court should decline jurisdiction and should grant the Motion to Dismiss.

This cause was instituted by six cargo owners (Nationals of Great Britain (one), Ireland (four) and Germany (one)), for the loss of goods aboard the German motor vessel "Hoheweg" which sank off the coast of England on February 14, 1955, after colliding with the Respondent Norwegian motor vessel "Sunny Prince". From the uncontroverted facts set forth in Claimant-Respondent's Motion to Dismiss filed on November 21, 1955, it appears that "the 'Sunny Prince' called at Dover, England, immediately after the collision and was surveyed, at which survey the 'Hoheweg' interests were represented." The ship then "proceeded to Rotterdam for discharging and repairs, and following repairs went to Ham-

burg, Germany." No attempt to arrest the M/V "Sunny Prince" was made at any of these ports, and although there was extensive correspondence and meetings nothing was done until the vessel was arrested at Port Everglades, Florida. Whatever reasons may have prompted and still may prompt forebearance in bringing suit in this jurisdiction are immaterial to the question presented, but there does not appear to be any reason why a suit should not have been brought, or arrest should not have been made, at a place where one or more of the parties in interest and the witnesses reside. This Court could exercise jurisdiction, but will entertain jurisdiction in causes between foreign parties arising from losses occasioned by the collision of two foreign vessels on the high seas **only** in those cases in which an injustice would be visited on either of the parties if the Court declined jurisdiction. No such showing has been made in this case. Rather, more cogent reasons exist that the suit should be maintained in either England, Norway, or Germany. All of the parties are citizens of either England, Norway, Germany, or the Irish Free State. The M/V "Sunny Prince" and the M/V "Hoheweg" were registered under the laws of Norway and Germany respectively. The officers and the crew of each vessel—the material witnesses—would not be available for compulsory attendance in this Court. For these reasons this Court declines jurisdiction in this case. See **Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.**, 285 U. S. 413, 423, 424 (1932).

The administration of justice in the Courts of our land is expensive. Our courts are for the most part burdened with more work than can be considered with proper dispatch. Although expense and docket conditions are secondary when weighed against considerations of jus-

tice, still such costs and the condition of dockets do have some weight when foreign litigants seek the use of our courts to litigate over losses occurring on the high seas in European waters.

This Court does, for the reasons stated, refuse jurisdiction of this suit. It is, therefore,

ORDERED AND ADJUDGED that the Motion to Dismiss filed on the 21st day of November, 1955, by the Claimant-Respondent, Olaf Pedersens Rederi A/S, be and the same is hereby granted and the costs incurred in this case shall be taxed against the Libelants.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of January, 1956.

/s/ EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

## APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA. MIAMI DIVISION. NO. 1307-M-ADM.

MOTOR DISTRIBUTORS, LTD., et al

Libelants

vs.

M/V "SUNNY PRINCE", her engines, boilers, tackle, etc.,

Respondent.

### ORDER DENYING PETITION FOR REHEARING AND AMENDING ORDER GRANTING MOTION TO DISMISS WITH REGARD TO COSTS

This cause coming before the Court upon receipt by the Court of the Libelants' Ex Parte Petition for Rehearing of the Court's Order of January 24, 1956, dismissing this cause, and the Court having read and considered the said Petition for Rehearing is of the opinion that it should be denied, except as to the fixing of costs, that upon further consideration of the taxing of costs in the Order Granting Motion to Dismiss, dated the 24th day of January, 1956, wherein the Court ordered that "the costs incurred in this case shall be taxed against the Libelants" the Court is of the opinion that the said provision taxing costs should be changed, altered and amended to read: "the costs incurred in this case shall be borne by the parties so incurring those costs and shall not be taxed," it is therefore

ORDERED AND ADJUDGED that the Libelants' Petition for Rehearing be and the same is hereby denied, except for the matter of judgment for costs; and it is

FURTHER ORDERED AND ADJUDGED that the Order Granting Motion to Dismiss, dated the 24th day of January, 1956, wherein the Court ordered that "the costs incurred in this case shall be taxed against the Libelants" be and the same is hereby changed, altered and amended to read: "the costs incurred in this case shall be borne by the parties so incurring those costs and shall not be taxed," but the said Order Granting Motion to Dismiss shall not be changed, altered or amended in any other respect and shall remain in full force and effect.

DONE AND ORDERED in Chambers, at Miami, Florida, this the 6th day of February, 1956.

/signed/ EMETT C. CHOATE
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## IN THE
## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

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**No. 16057**

---

MOTOR DISTRIBUTORS, LTD., ET AL.,
Appellants,

versus

OLAF PEDERSEN'S REDERI A/S owner of the M/V "SUNNY PRINCE",
Appellee.

**Appeal from the United States District Court for the Southern District of Florida**

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(November 27, 1956.)

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Before RIVES, TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This appeal requires an answer to two questions: (1) Under what circumstances should a district court dismiss a libel in rem filed against a foreign ship by nationals of other foreign countries in a cause arising out of a collision on the high seas between foreign vessels of different nationalities on the ground that all parties at interest are citizens of foreign states? (2) To what extent is the exercise by the trial court of its

discretion in answering this question subject to review in the Court of Appeals?

This is an appeal from an order dismissing a libel against the M/V SUNNY PRINCE because the trial court "refused [d] jurisdiction of the suit."

The facts necessary for a determination of the questions raised here are not in dispute.

Appellants, the libelants below, are six owners of cargo on the M/V HOHEWEG, a German vessel.[1]

On February 14, 1955 the Hoheweg, proceeding from Germany to Ireland, was struck and sunk on the high seas by the Sunny Prince, a Norwegian vessel, proceeding from the Philippines to Holland. All the crew of the Hoheweg were picked up and the Sunny Prince put in at an English port, its damage was surveyed in the presence of representatives of the Hoheweg interests, and the same night it left for Holland to discharge its cargo and then to Germany to be repaired.

On February 17, 1955 the Norwegian underwriters of the Sunny Prince offered to guarantee British limitations (£39,300, at £8/net registered ton) and British jurisdiction, provided all the Hoheweg ownership and cargo interests agreed; this offer was accepted by the Hoheweg interests.

On March 5, 1955 owners of the Sunny Prince joined in the above offer of limitations and jurisdiction.

[1] 3 Irish corporations, 1 Irish partnership, 1 German, and 1 British corporation. An affidavit later submitted alleged that 16 other similarly situated interests wished to intervene: 12 Irish, 2 British, and 2 German.

On March 14, 1955 German insurers of the Hoheweg hull accepted the above offer. (To the district court it was originally represented by the appellees that the acceptance was by the German insurers of the cargo; this was apparently not so.)

After repairs the Sunny Prince resumed her trading between the Hamburg-Antwerp area and the Far East, calling on German, Dutch, Bermudan, Cuban, and Philippine ports, but at no other British ports.

On October 21, 1955 Sunny Prince was libeled and arrested in Florida, as soon as she arrived at her first post-accident call on a United States port.

This is how matters stood when the trial court heard claimants-respondent's (appellee's) motion to dismiss the libel. However, before the matter was heard, testimony of the captain and of other officers and crew members was taken by deposition aboard the vessel; logs and other data material to the cause of the collision were produced and identified and appellants' surveyors examined the Sunny Prince's steering mechanism and plans.

The trial court declined to take jurisdiction primarily on the ground that "This Court could exercise jurisdiction, but will entertain jurisdiction in causes between foreign parties arising from losses occasioned by the collision of two foreign vessels on the high seas only in those cases in which an injustice would be visited on either of the parties if the court declined jurisdiction." The court found there was no such showing made.[2]

Accepting as the leading authority in this field the Supreme Court's decision in The Belgenland, 114 U.S. 355, as do both parties here, we are convinced that the trial court departed from the correct principle of law applicable to situations such as here presented. That rule of law is succinctly stated by Mr. Justice Bradley:

> "The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that **they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it.**" (Emphasis added.) The Belgenland, 114 U.S. 355, 367.

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[2]The major portion of the order is here more fully reproduced:

"This cause coming on to be heard upon the Claimant-Respondent's Motion to Dismiss filed in this cause on the 21st of November, 1955, and the court having heard argument of counsel on the 13th of January, 1956, and having examined the briefs submitted, is of the opinion that this Court should decline jurisdiction and should grant the Motion to Dismiss.

"This cause was instituted by six cargo owners (Nationals of Great Britain (one), Ireland (four) and German (one), for the loss of goods aboard the German motor vessel 'Hoheweg' which sank off the coast of England on February 14, 1955, after colliding with the Respondent Norwegian motor vessel 'Sunny Prince'. From the uncontroverted facts set forth in Claimant-Respondent's Motion to Dismiss filed on November 21, 1955, it appears that 'the "Sunny Prince" called at Dover, England, immediately after the collision and was surveyed, at which survey the "Hoheweg" interests were represented.' The ship then 'proceeded to Rotterdam for discharging and repairs, and following repairs went to Hamburg, Germany.' No attempt to arrest the M/V 'Sunny Prince' was made at any of these ports, and although there was extensive correspondence and meetings nothing was done until the vessel was arrested at Port Everglades, Florida. Whatever reasons may

Instead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice.

Nothing in **Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.**, 285 U.S. 413, the other leading case cited by appellee, in any way detracts from this rule. In citing this case in its opinion the trial court failed to recognize the clear distinction between the facts here and those that led the Supreme Court in the Canada Malting Co. case to approve the refusal to accept jurisdiction there. The circumstances as to the libel in rem against the Sunny Prince bring it precisely within the fact situation of The Belgenland. There, as here, all of the parties were citizens of foreign states and the ship was of foreign ownership

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have prompted and still may prompt forbearance in bringing suit in this jurisdiction are immaterial to the question presented, but there does not appear to be any reason why a suit should not have been brought, or arrest should not have been made, at a place where one or more of the parties in interest and the witnesses reside. This Court could exercise jurisdiction, but will entertain jurisdiction in causes between foreign parties arising from losses occasioned by the collision of two foreign vessels on the high seas only in those cases in which an injustice would be visited on either of the parties if the Court declined jurisdiction. No such showing has been made in this case. Rather, more cogent reasons exist that the suit should be maintained in either England, Norway, or Germany. All of the parties are citizens of either England, Norway, Germany, or the Irish Free State. The M/V 'Sunny Prince' and the M/V 'Hoheweg' were registered under the laws of Norway and Germany respectively. The officers and the crew of each vessel —the material witnesses—would not be available for compulsory attendance in this Court. For these reasons this Court declines jurisdiction in this case. See Canada Malting Co., Ltd., v. Paterson Steamships, Ltd., 285 U.S. 413, 423, 424 (1932)."

and registry and the collison occurred on the high seas. Under such circumstances, the Court said:

> "Neither party has any peculiar claim to be judged by the municipal law of his own country since the case is pre-eminently one communis juris and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the res or parties than it could be by the courts of either of the nations to which the litigants belong." The Belgenland, 114 U.S. 355, 369.

How different were the facts in the Canada Malting Co. case is clearly shown by the language of the opinion of the Supreme Court in declining to upset the refusal of the trial court to accept jurisdiction. The Court there said:

> "There is no basis for the contention that the district Court abused its discretion. All the parties were not only foreigners, but were citizens of Canada. Both the colliding vessels were registered under the laws of Canada; and each was owned by a Canadian corporation. The officers and crew of each vessel—the material witnesses —were citizens and residents of that country. The cargo, in each case, was shipped under a Canadian bill of lading from one Canadian port to another . . . . It is difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners."

**Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.**, 285 U.S. 413, 423, 424.

The principle of law established in The Belgenland has been followed uniformly in cases where there is a similar fact situation. The Western Farmer (2 Cir.), 210 F. 2d 754; The Mandu (2 Cir.), 102 F. 2d 459; The Attualita (4 Cir.), 238 Fed. 909; The Kaiser Wilhelm der Grosse (S.D.N.Y.) 175 Fed. 215; **Chubb v. Hamburg-American Packet Co.** (E.D.N.Y.), 39 Fed. 431.

It is manifest that the decisions of the Supreme Court, the Courts of Appeals and the District Courts have established a judicial policy in this important field of maritime law. This policy is stated in the opinion of the Court of Appeals for the Second Circuit in The Western Farmer.

> " . . . As Bradley, J., said in The Belgenland, 114 U.S. 355, 365, 5 S.Ct. 860, 865, 29 L.Ed. 152: 'although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris,—that is, where they arise under the common law of nations,—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it.' This language Bradley, J., followed by an exhaustive examination of the authorities

> decided up to that time; and it has never been questioned. We hold that, in the case of a collision on the high seas, an alien plaintiff has the privilege of suing an alien defendant wherever he can serve him, or attach his property; and that, if the defendant would avoid the suit, he must show that he will be unfairly prejudiced, unless it be removed to some other jurisdiction." The Western Farmer (2 Cir.), 210 F. 2d 754, 755, 756.

The next question is whether the circumstances of this case are such as would authorize this Court to set aside the finding of the trial court. As to this matter the Supreme Court itself set the standard:

> "The plaintiffs must show that the (trial) judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeals holds, that they are justified in saying he has exercised it wrongly."
>
> The Belgenland, 114 U.S. 355, 368.

On both counts it appears to us the discretionary act of the trial court must be set aside. We have demonstrated that it acted on the wrong legal principle; and we have shown as to the particular fact situation here present, the trial court has acted so absolutely differently from the view that not only this Court, but also the other courts mentioned, hold that it must be said that the trial court exercised its discretion wrongly. Moreover, the Supreme

Court came very close to prescribing an absolute rule of law where on page 368 of The Belgenland it said:

> "Indeed where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, **there seems to be no good reason why the party injured** or doing the service, **should ever be denied justice in our courts.**" (Emphasis added.)

The suggestion by the Court that the proceedings should have been brought where one or more of the parties in interest and the witnesses reside runs counter to the reasoning of the Supreme Court in The Belgenland, where it is plainly stated that such a case can generally be more impartially and satisfactorily adjudicated by the court of a third nation having custody of the res.

Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against a vessel, to proceed in rem in the jurisdiction where the vessel is found.

Viewing the fact situation that was presented to the trial court, and in light also of the subsequent developments,[1] we are convinced that in the light of the applica-

[1]It is made to appear to us by affidavit, as is permissible in admiralty cases, that, based upon consent given by appellees, an action in personam against the owners has been commenced in June 1956 by the owners of the Hoheweg in the British Admiralty Court, and in August 1956 the Sunny Prince was arrested in Germany in rem by German owners of cargo, and forced to post security. Both of these actions might naturally follow the refusal of the United States court,

ble law, the trial court erroneously dismissed the action, and that its judgment must be reversed and the cause remanded for trial.

REVERSED and REMANDED.

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at the insistence of appellee, to accept jurisdiction. Such added inconvenience as may result to appellee from these additional actions may properly be charged to appellee for its having temporarily succeeded in casting doubt upon the validity of the proceedings in the court below. It cannot complain that it must now defend in other places when it stoutly maintained that the present action should be dismissed. Neither should this result be considered in determining the right of appellants to proceed below.

## APPENDIX D

## JUDGMENT

**Extract from the Minutes of November 27, 1956.**

MOTOR DISTRIBUTORS, LTD., ET AL.,

No. 16057. versus

OLAF PEDERSEN'S REDERI A/S owner of the M/V "SUNNY PRINCE".

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decree by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for trial;

It is further ordered, adjudged and decreed that the appellee, Olaf Pedersen's Rederi A/S owner of the M/V "Sunny Prince", be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

## APPENDIX E

## ORDER DENYING REHEARING

**Extract from the Minutes of January 8, 1957.**

MOTOR DISTRIBUTORS, LTD., ET AL.,

No. 16057. versus

OLAF PEDERSEN'S REDERI A/S owner of the M/V "SUNNY PRINCE".

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * * *

APR 1 0 19
JOHN T. FEY,

IN THE

# Supreme Court of the United States

October Term, 1956

No. 887

OLAF PEDERSEN'S REDERI A/S, as Claimant of the M/V SUNNY PRINCE,

*Petitioner,*

*against*

MOTOR DISTRIBUTORS, LTD., ET AL.,

*Libelants-Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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*Libelants-Respondents.*

No. 887

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION

### Opinions Below

The Opinion of the Court of Appeals (Appendix C, App. 6-15 of Petition) is reported in 239 F. 2d 463. The opinion of the district court is unreported and is printed in Appendix A of the Petition.

### Jurisdiction

The jurisdictional requisites are set forth in the Petition.

### Questions Presented

I

In what circumstances should a district court dismiss a libel in rem in Admiralty filed against a foreign ship by nationals of other foreign countries in a cause aris-

ing out of a collision on the high seas between vessels of different nationalities where there is no common home forum available to the parties?

II

To what extent is the exercise by the district court of its discretion in answering the question just stated subject to review in the Court of Appeals?

**Statement**

Respondents, libelants in the district court, are Irish, British and German nationals, owners of cargo shipped on board the German motor vessel HOHEWEG.

On February 14, 1955, the HOHEWEG, en route from Germany to Ireland, was struck and sunk by the petitioner's SUNNY PRINCE, a Norwegian vessel, proceeding from the Philippines to Holland. The collision occurred on the high seas at 50° 46.5″ North latitude and 0° 43″ East longitude.

On the day of the collision the crew of the sunken HOHEWEG was taken to Dover by the SUNNY PRINCE and thereafter repatriated to Bremerhaven. The SUNNY PRINCE was inspected at Dover on the date of the collision by hull surveyors and that night resumed her voyage to Rotterdam. At Rotterdam she discharged her cargo and was repaired. She then resumed her trading between ports in the Hamburg/Antwerp range and the Far East via American ports and the Panama Canal (R. 25). She was not engaged in trade to English ports, and was at an English port, Dover, for only a few hours to disembark the HOHEWEG survivors and receive permission of surveyors to resume her voyage to Rotterdam.

Just prior to the collision, the vessels were on courses for a normal port to port passsage. The SUNNY PRINCE

suddenly sheered to port and at a speed of 10 knots cut deeply into the port side of the HOHEWEG, inflicting a mortal wound. Those in charge of the SUNNY PRINCE, in depositions taken in the proceedings in the district court, admitted that the steering mechanism had worked perfectly prior to the collision. They also testified that, strangely enough, it worked perfectly immediately after the collision. No defect was subsequently found in the SUNNY PRINCE steering mechanism (R. 25).

So far as collision liability is concerned, the issue is simple. The issue on the merits is whether the SUNNY PRINCE was guilty of negligence as claimed by respondents or whether the collision was the result of an "inevitable accident" as claimed by the SUNNY PRINCE (R. 12, 55).

On February 17, 1955, the Norwegian underwriters of the SUNNY PRINCE offered to submit to English jurisdiction (although the SUNNY PRINCE was not trading to England, and her owners had no place of business or residence there) . The offer to submit to English jurisdiction was conditioned, however, upon the HOHEWEG hull interests and all the HOHEWEG cargo owners appearing in England and agreeing that SUNNY PRINCE owners' liability could be limited to £39,300 (£8 per net registered ton, according to the English limitation of shipowners' liability statutes, Merchant Shipping Act, 1862, 25 and 26 Vict. C. 63, as reenacted in the Merchant Shipping Act, 1894, 57 and 58 Vict. C. 60). This offer was accepted by the HOHEWEG interests, but not by the respondent cargo interests (R. 26, 41).

Respondents filed their timely libel *in rem* in admiralty against the SUNNY PRINCE on October 20, 1955 and jurisdiction was promptly established by her arrest at Port Everglades, Florida.

On October 21, 1955, pursuant to court order on respondents' application, testimony of the captain and of certain other officers and crew members was taken by deposi-

tion *de bene esse* aboard the vessel at Port Everglades; pertinent logs and other data material to the collision were produced and marked for identification. Respondents' expert surveyors examined the vessel's steering merchanism and plans at Port Everglades (R. 22-25).

A claim of owner and release bond in the agreed sum of $150,000 to secure respondents' damage claims, was filed with the court below by the petitioner, owner of the SUNNY PRINCE, and the vessel was thereupon released from the Marshal's custody (R. 9).

On November 21, 1955 petitioner filed a motion in the district court for an order declining jurisdiction and dismissing the libel of respondents on the ground that retention of jurisdiction would constitute an "unreasonable burden" upon the petitioner in that it would require petitioner to "defend two suits, one in Great Britain and one in Florida both arising out of the same collision" (R. 12). At this time, however, no suit had been brought in England. Indeed, it was not until nearly eight months later, June 19, 1956 that suit was commenced in England in the name of the German owners of the HOHEWEG, and the petitioner then filed its voluntary appearance in that suit.

Petitioner further alleged in the district court, in its motion papers of November 21, 1955, that respondents, as owners of cargo lost on the HOHEWEG, had agreed to accept the SUNNY PRINCE offer of British jurisdiction subject to English limitation of liability (R. 11). The person alleged to have so accepted on behalf of respondent cargo interests was named in the petitioner's motion papers of November 21, 1955 as a "Mr. W. Schuchmann", not then otherwise identified. It developed, however, that Mr. Schuchmann, far from being a representative of any cargo interests, was the owner of the HOHEWEG (R. 47). His interests were dissimilar to those of respondents, he had no authority to bind respondents, and apparently he did not purport to.

Petitioner's offer of English jurisdiction with English limitation of liability was never accepted by respondents (R. 62-64).

It was also urged by petitioner that testimony of additional witnesses abroad would be required and that this would impose great hardship and inconvenience on petitioner (R. 13). So far as the convenience of witnesses is concerned, to the extent that it might be material, depositions already have been taken in this case in Florida from some of the petitioner's important witnesses (R. 22-24). If petitioner desires to produce further witnesses, their testimony, as customary in American admiralty practice, can be taken by deposition *de bene esse*. They are under petitioner's control and no question of compulsory process is pertinent.

Petitioner's moving papers of November 21, 1955, in the district court, urged that respondents could have arrested the SUNNY PRINCE in England, Germany, Holland or Norway. Petitioner's conclusion was that such jurisdictions were not availed of by respondents because the laws of those countries would be less favorable to respondents than the laws of the United States (R. 11).

Following oral argument before Judge Choate on January 13, 1956, the district court reserved decision. On January 24, 1956, judgment was entered declining jurisdiction and dismissing the libel (R. 50-52).

The district court concluded that:

> "there does not appear to be any reason why a suit should not have been brought, or arrest should not have been made, at a place where one or more of the parties in interest and the witnesses reside. The Court could exercise jurisdiction, but will entertain jurisdiction in causes arising from losses occasioned by the collision of two foreign vessels on the high seas only in those cases in which an injustice would be visited on either of the parties if the court declined jurisdiction. No such showing has been

made in this case. Rather, more cogent reasons exist that the suit should be maintained in either England, Norway or Germany."

Respondent's petition for rehearing in the district court was denied, except as to costs (R. 65).

The Court of Appeals for the Fifth Circuit unanimously reversed the district court's order of dismissal and remanded the case for trial. Petition for rehearing was denied.

## Argument

The petition states a question which, we submit, does not reflect the issues decided below.

Question "a", at pp. 2-3 of the petition restates no holding or *obiter dictum* of the Court of Appeals. It was not decided and not contended that non-resident aliens "have an absolute right" to maintain an action *in rem* against a foreign flag vessel owned by an alien of another nationality in respect of a cause of action arising outside of United States territory. The issue simply relates to generally accepted criteria for exercise of jurisdiction in high seas collision cases between aliens of different nationality. The power of the Court of Appeals to review a discretionary order of the district court in such circumstances, have long been well settled in both the United States and in England.

The District Judge was reversed for exercising discretion on wrong principles, clearly opposed to the views of the courts of appeals and of this Court. No case cited by petitioner is in conflict with the opinion of the court below.

### I.

### THE OPINION OF THE COURT OF APPEALS ANNOUNCES NO NEW PRINCIPLES BUT FOLLOWS LONG ESTABLISHED AND CONSISTENT PRECEDENT.

Criteria for the exercise of admiralty jurisdiction in suits between foreigners were reviewed, reiterated and

definitively laid down by the Court in *The Belgenland,* 114 U. S. 355 (1885). These rules have been followed consistently.

The careful opinion of the Court, by Mr. Justice Bradley, deals with the various classes of cases which arise. It permits the exercise of much broader individual discretion in some types of cases than in others. For example, claims by foreign seamen against their foreign vessel, involving matters of internal discipline, foreign law, or foreign tort, permit exercise of the broadest discretion for rejection of jurisdiction because the foreign consul or the claimants' home courts are generally more appropriate vehicles for disposition of such claims, and generally no injustice can be said to be imposed on the complaining party by relegating him to the judicial processes of his home forum and the laws of his own country.

Similarly in cases of cargo damage arising against a foreign carrying vessel, where the rights of the parties are governed by foreign contract, or foreign law, or where the bill of lading or charter party provides for adjudication abroad, there are liberal criteria for exercise of discretion in the matter of jurisdiction (114 U. S. at pp. 363-65).

However, in cases arising out of high seas collisions between ships of different nationalities, where the parties have no common home forum, the rule in our courts has always been that jurisdiction will be retained in the interests of comity and justice unless special circumstances exist to show that justice would be better subserved by declining it (114 U. S. at pp. 367-69). In no such high seas collision case between foreigners of different nationalities has justice as applied in the United States ever been denied before.

See:

*The Western Farmer* (2nd Cir. 1954), 210 F. 2d 754, 756, Petition dismissed per Stipulation, 348 U. S. 801 (1954).

*The Cuma* (4th Cir. 1954), 210 F. 2d 261.
*The Mandu* (2nd Cir. 1939), 102 F. 2d 459.
*The Attualita* (4th Cir. 1916), 238 F. 909.
*The Kaiser Wilhelm Der Grosse* (S. D. N. Y. 1909), 175 F. 215, 217.
*Chubb* v. *Hamburg-American Packet Company* (E. D. N. Y. 1899), 39 F. 431.

In *The Belgenland,* the court, in stating the rule for determination on appeal whether the court of original jurisdiction has exercised its discretion wrongly, quoted from the English case of *The Leon,* 8 Prob. Div. 121:

> "The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeals holds, that they are justified in saying he has exercised it wrongly." (114 U. S. at p. 368).

The Court of Appeals in the case at bar said:

> "Instead of the rule being, as the trial court here stated, that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice". (239 F. 2d at p. 465).

There was no evidence before the district court that justice would be better subserved by dismissing the respondents' libel and forcing them to proceed anew either in England, the forum proffered and preferred by the petitioner, or in Germany (home forum of the HOHEWEG), or in Norway (petitioner's home forum).

As a matter of comity and international maritime law, respondents are entitled to a neutral forum. *The Belgenland,* 114 U. S. at p. 369. The only neutral forum suggested by the district court was that of England (R. 52). Petitioner is not subject to process in England; it agreed to England

only providing it could have, without contest, English limitation of liability, measured at £8 per ton, or some £39,300 ($110,000) to satisfy respondents' damages of $170,000 and additional substantial damages to the HOHEWEG owners for total loss of their vessel, and damages of other claimants. In summary, the district court would have permitted the petitioner, respondent below, to choose the forum, and one in which respondents (libelants below) would be deprived of their rights to *restitutio in integrum* under American and general maritime law.

The English limit of £8 per ton was set in 1854, and was intended to represent the then average value of merchant ships. It was a realistic figure 100 years ago, and it stands as an anachronism today because it is far below the average tonnage value of merchant ships. See *Temperley, The Merchant Shipping Acts* (5th ed. 1954), 327 et seq.; *Marsden, Collisions at Sea* (10th ed. 1953), 177-78; *Preliminary Reports, Madrid Conference, International Maritime Committee* (Antwerp, 1955), p. 15. It is true that in some cases the United States limitation statute (46 U. S. Code § 183 et seq.) might involve an even greater injustice than the English statute, as where the offending vessel is a total loss, but the SUNNY PRINCE was not lost and her limitation value in the United States is measured by her market value after the collision plus her pending freights, a sum far in excess of the inadequate British limit of £8 per ton.

Not one case relied upon by petitioner involves facts similar to *The Belgenland* or to the case at bar. Every case cited by petitioner in support of its argument falls into categories clearly calling for exercise of different or broader criteria of discretion. These categories are carefully discussed in *The Belgenland*. Thus, the cases relied upon by petitioner involve (1) actions by foreign seamen against their foreign vessel in respect of injuries on board ship

involving foreign law or foreign contract, with a common home forum between plaintiff and defendant; (2) actions between foreign shippers and foreign ships or owners in causes of breach of contract of affreightment where the contract was made abroad or expressly stipulated it was to be determined in a foreign court and under foreign law; (3) actions arising out of torts committed in foreign territorial waters involving application of the *lex loci delicti,* as distinguished from high seas collisions involving international maritime law (The International Rules of the Road at Sea) in causes *communis juris;* (4) actions between ships or parties of the same nationality, with a common home forum in which to litigate. Petitioner is clearly wrong when it cites these cases as "in conflict with" the ruling of the court below.

Petitioner just as speciously urges that the issuance of a writ in this case "is necessary to prevent extraordinary prejudice, inconvenience and embarrassment to petitioner". No more prejudice, inconvenience or embarrassment is encountered by petitioner here than is always to be encountered by any tort feasor in a collision case or in any litigation.

Petitioner cannot properly complain of prejudice or inconvenience because respondents filed suit in the United States, where the SUNNY PRINCE trades, was found and arrested, where her captain and other witnesses from the crew were conveniently within the court's jurisdiction, and where testimony was taken, the ship inspected and photographed, and her log books and other documents exhibited and copied for the record. We cannot conceive why petitioner should be "embarrassed" (Petitioner's brief, pp. 8, 9), unless the embarrassment be that petitioner failed in its scheme to draw respondents into another jurisdiction of petitioner's own preference, where petitioner sought benefits of a limitation law more favorable to owners and least favorable to injured innocent third parties.

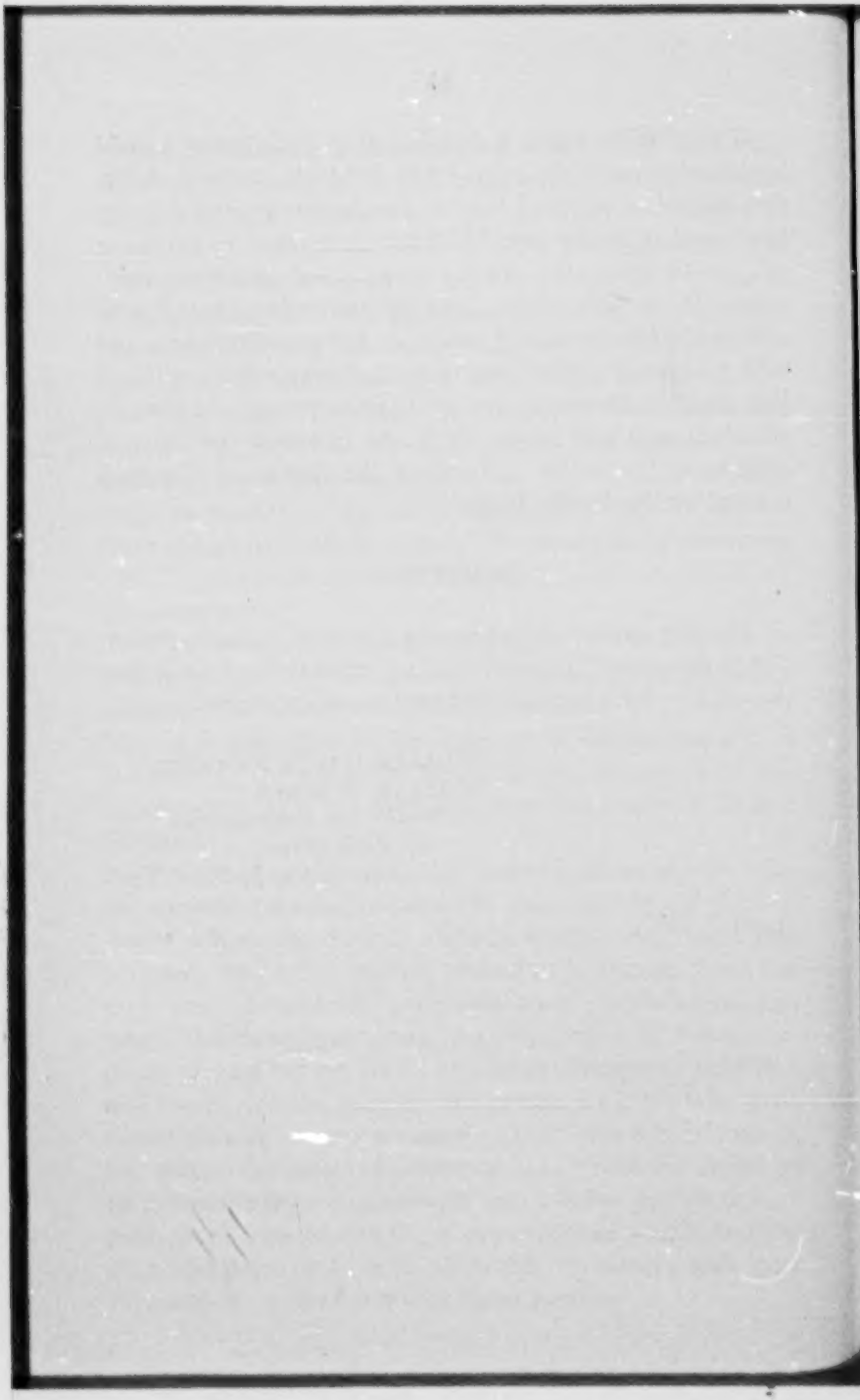
The district court, in holding that jurisdiction should be denied, ignored the rule of *The Belgenland* that jurisdiction should be retained "unless special circumstances exist to show that justice would be better subserved by declining it". In so doing, the district judge acted on wrong principles. It would have relegated the respondents to a forum selected by the defending petitioner for no valid reason and with no intended effect but to deprive respondents of their just claim to indemnity for petitioner's wrong. In the circumstances, it was surely within the power of the court of appeals to do justice and vacate the decree of dismissal entered by the district judge.

## CONCLUSION

For the reasons stated by the Court of Appeals, below, and in this brief in opposition, we respectfully submit that the petition for a writ of certiorari should be denied.

WILLIAM GARTH SYMMERS
WILLIAM WARNER
*Counsel for Respondents*
37 Wall Street
New York 5, New York

April 9, 1957.



APR 15 19
JOHN T. FEY,

IN THE

# Supreme Court of the United States

**October Term, 1956**

**No. 887**

CLAF PEDERSEN'S REDERI A/S, as claimant of the M/V SUNNY PRINCE,

*Petitioner,*

*against*

MOTOR DISTRIBUTORS, LTD., *et al.*,

*Libelants-Respondents.*

## PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In their Brief in Opposition respondents concede (p. 6) that if the United States Court of Appeals for the Fifth Circuit held that non-resident aliens have an absolute right to maintain an action *in rem* against a foreign flag vessel in the Courts of the United States such would be error. As pointed out in the Petition for Writ of Certiorari, that is precisely what the Court of Appeals for the Fifth Circuit did.

The Circuit Court held that if jurisdiction ever should be declined, it should not be declined in a case where a libelant has a maritime lien against a vessel; the "universally recognized" rule of law is that such libelant has "the right * * * to proceed in rem in the jurisdiction where the vessel is found" (App. 14). That this is the holding of the Court of Appeals is proved by the fact of its remanding the cause for trial (App. 15). If the Court of Appeals had

considered that the District Court had discretion to decline jurisdiction of a suit such as this, it should have remanded the case to the District Court for the exercise of the *District Court's* discretion on the basis of the principles enunciated by the Court of Appeals. The only "universally recognized" rule of law in such a situation as this is that libelants having a maritime lien should not be denied security. But, as pointed out at page 13 of the Petition herein, no case should be retained simply because the libelants' security is in the Court's power. In this case the Petitioner has given security in the British Admiralty Court. If the District Court had been of the opinion that these libelants were entitled to additional security it could have required the Petitioner herein to post such security as a condition to the Court's declining jurisdiction. This the Petitioner has always been, and still is, willing to do.

The District Court's decision declining jurisdiction recognized that retention of jurisdiction caused extraordinary prejudice, inconvenience and embarrassment to the petitioner and "that justice would be better subserved by declining it." *The Belgenland,* 114 U. S. 355, 367. The Court of Appeals did not consider and did not afford the District Court an opportunity to consider whether "justice would be better subserved by declining" jurisdiction.

Respondents in their brief (p. 10) seek to lessen the necessity for the issuance of a writ in this case by denying that retention of jurisdiction will cause extraordinary prejudice, inconvenience and embarrassment to petitioner. This is wholly incorrect, as is shown by the fact that the District Court itself found that "The officers and the crew of each vessel—the material witnesses—would not be available for compulsory attendance in this [District] Court." (District Court Opinion, App. 2.) Further, witnesses from the German motor vessel Hoheweg which came into collision with the Sunny Prince (the owner of the Hoheweg is not before the Florida Court although he is

before the British Admiralty Court) and witnesses from the yard in which the Sunny Prince was built and witnesses from the various European suppliers and yards concerned in repairs and maintenance will be required in defense of this action. The great difficulty or impossibility of producing these witnesses in the Florida Court would work great hardship upon petitioner.

Respondents protest (p. 8) that "comity and international law" entitle them to a neutral forum, citing *The Belgenland, supra. The Belgenland,* however, bases the justification for a neutral forum on the fact that "Neither party has any peculiar claim to be judged by the municipal law of his own country * * *" (p. 369). It is, in fact, difficult to see how a litigant can insist on a neutral forum in preference to his *own* forum.

Indeed, respondents concede in their Brief in Opposition (p. 7) that "generally no injustice can be said to be imposed on the complaining party by relegating him to * * * the laws of his own country." Nevertheless, they argue (p. 9 of Brief in Opposition) the "injustice" of the British statute regarding limitation of liability. This is precsely the law applicable in the home courts of 20 of the 21 libelants now in the case, and they cannot cry for a neutral forum since petitioner has already submitted to the jurisdiction of the British Court. For the one German libelant the courts of Great Britain are just as neutral as are those of the United States.

Respondents have contended in their Brief in Opposition (pp. 3, 8, 9) that the petitioner agreed with the owner of the Hoheweg to British jurisdiction only if the Petitioner herein "could have, without contest, English limitation of liability * * *" (p. 9). This is not true. But even if it were, and if, as they contend, respondents are not a party to that agreement, the respondents nevertheless can take advantage of the fact that the Sunny Prince interests are before the British Court and respondents can contest in the British Court the Sunny Prince's right to limit liability.

Respondents are not deprived of any right given to them by their own law.

Finally, Respondents' Brief in Opposition, particularly in the "Questions Presented" (pp. 1, 2), concedes the importance of establishing criteria for the exercise of judicial discretion in this field. As stated by *Bickel* in 35 Cornell Law Quarterly 12, cited on pp. 12-14 of the Petition for Writ of Certiorari herein, help is needed "in the form of policy pronouncements from appellate courts to give direction to the exercise of discretion * * *." We submit that this case in which there is no American contact with the facts of this case, except the admitted (Respondents' Brief, p. 9) desire of Respondents to obtain the benefits of American law which in this instance is more favorable than their own law, provides the ideal opportunity for this Court to give the guidance and help which District Courts need for the exercise of their judicial discretion.

## CONCLUSION

**It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.**

Respectfully submitted,

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JOHN T. FEY,

IN THE

# Supreme Court of the United States

**October Term, 1956**

**No. 887**

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OLAF PEDERSEN'S REDERI A/S, as claimant of the M/V SUNNY PRINCE,

*Petitioner,*

*against*

MOTOR DISTRIBUTORS, LTD., et al.,

*Libelants-Respondents.*

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 22, 1957, denying the petition for writ of certiorari, 25 United States Law Week 3307 (not yet officially reported), and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed April 6, 1957, herein.

### Reasons for Granting Rehearing and Issuing the Writ

1. Two days after the petition herein was filed this Court announced its opinion in *William Benz, et al.* v. *Compania Naviera Hidalgo, S.A.*, 353 U. S. 138, containing the following statement:

> "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects *itself* to the laws and jurisdiction of that country. *Wildenhus's Case*, 120 U. S. 1 (1887). *The exercise of that jurisdiction is not mandatory but discretionary.*" (Emphasis supplied.) (p. 142).

We submit that this pronouncement by this Court should be controlling and that subsequent denial of certiorari in the instant case in which the Court of Appeals for the Fifth Circuit held that there is no discretion to decline an admiralty suit *in rem* will tend to increase the already "large percentage of confusion" (Petition for Writ of Certiorari herein, p. 14) existing in the field of discretionary jurisdiction.

In the *Benz* case the foreign petitioners sought the benefit of our labor laws in connection with a dispute against the foreign shipowner. "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing" (p. 142). In the instant case there is absolutely no American connection with the facts except the admitted dissatisfaction of the claimants with their own law and/or their own courts and their desire to obtain the benefits of United States law. They admit (Brief for Respondents in Opposition, p. 9) that if the fact situation had been different, they would have resisted United States jurisdiction. Denial of the petition for certiorari herein without clarification of the reasons therefor is inconsistent with the statement of this Court in the *Benz* case, *supra*, and is tacit approval by this Court of the abhorrent practice of "forum shopping."

2. The burden to international commerce in subjecting foreign vessels to extended litigation involving foreign causes of action with no American contact and only nonresident aliens, plus the unfairness to United States citizens in burdening our already overcrowded court calendars with cases which are admittedly here only because the claimants hope to avoid the consequences of their own law, serve to emphasize the need for clarification in the increasingly important field of discretionary jurisdiction in admiralty.

3. The Court of Appeals for the Fifth Circuit in remanding this case to the District Court for trial held that

there is no discretion to decline an *in rem* suit and that a "libelant, possessing a maritime lien against a vessel" has a right "to proceed in rem in the jurisdiction where the vessel is found" (Petition for Writ of Certiorari herein, App. 14). This Court in the *Benz* case stated (353 U. S. 138, 142) that the exercise of jurisdiction by our Courts over a "*ship * * * itself*" (the *res*) is discretionary, not mandatory. We respectfully submit that since this Court stated in the *Benz* case that the exercise of jurisdiction in cases such as this is discretionary, it should have granted the petition herein in order to establish criteria regarding the exercise of discretion. In the alternative, we submit, this Court, even though denying the petition herein, should have issued a direction to the Court of Appeals directing that the case be remanded to the District Court for the exercise of discretion in accordance with the *Benz* case, *supra*, and not inconsistent with the law of the Fifth Circuit regarding discretionary jurisdiction.

## Conclusion

For the reasons set forth above and in the petition for writ of certiorari, petitioner's reply to respondents' brief in opposition, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the ~~Second~~ Fifth Circuit.

Respectfully submitted,

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**Certificate of Counsel**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

RICHARD F. RALPH,
*Counsel for Petitioner.*